NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-289-02T3

DANIEL O'CALLAGHAN,

Plaintiff-Respondent/
Cross-Appellant,

v.

V J B,

Defendant-Appellant/
Cross-Respondent.

Argued: May 21, 2003 - Decided: July 1, 2003

Before Judges Fall and Weissbard.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket Number FD-14-581-00.

Catherine F. Riordan argued the cause for appellant/ cross-respondent (Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, attorneys; Bonnie C. Frost and Ms. Riordan, on the brief).

Daniel J. O'Callaghan, respondent/cross-appellant, argued the cause pro se.

PER CURIAM

On leave granted, defendant V J B appeals from those portions of an order entered in the Family Part on August 30, 2002, vesting joint legal custody of the child D with both parties, and barring her from enrolling D in the American Boychoir School in Princeton. Plaintiff Daniel J. O'Callaghan cross-appeals, contending the Family Part erred by failing to grant all relief sought by him in his numerous applications to the court since June 2002.

The procedural history of this Family Part case was outlined in detail in our unpublished opinion decided October 29, 2002, and need not be recounted here. See O'Callaghan v. B, A-4782-00T3 and A-6659-00T3 (Oct. 29, 2002). In that opinion, we affirmed orders entered in the Family Part on February 6, 2001, March 26, 2001, and June 28, 2001, "substantially for the reasons articulated by Judge Harper in his comprehensive written opinions accompanying each order." Id. at 41-42.

At the time we issued our October 29, 2002 opinion, we noted the following:

> At argument, plaintiff informed this court that subsequent to the June 28, 2001 order, additional proceedings have been conducted in the Family Part pertaining to an application by defendant for permission to enroll D in the American Boychoir School located in Princeton, and that there was a pending appeal concerning an order entered in the Family Part on August 30, 2002, regarding various issues.

Upon contacting the Clerk's Office, we have determined that another appeal is presently pending in this court, docketed as A-289-02T3, from an order entered in the Family Part on August 30, 2002 by Judge David B. Rand. That order prohibited the enrollment of D in the American Boychoir School; directed that D be enrolled in the Chester school system for the 2002-2003 school year; provided for the parties to share joint legal custody of D; required D to receive immediate therapeutic counseling at the parties' shared cost; and re-instated plaintiff's parenting time with D with Chester library as the pick-up and drop-off point.

On September 10, 2002, an order was entered in this court, granting defendant's motion for leave to appeal from the August 30, 2002 order, and entering a stay of the August 30, 2002 order, pending appeal. That order stated it was this court's intent to permit defendant to enroll D in the American Boychoir School as a day student for the 2002-2003 school term.

[Id. at 40-41.]

Upon affirming the February 6, 2001, March 26, 2001, and June 28, 2001 orders, we remanded the matter to the Family Part

> on the issue of whether overnight parenting-time sessions between D and his father are in D's best interest and, if so, the nature and frequency of same. We do not view the stay granted in the September 10, 2002 order entered in A-289-02T3 as preventing the Family Part from determining an appropriate parenting plan for D with his father. We leave the case management of that issue including,

> but not limited to, whether appointment of a guardian ad litem and/or mental health professional, are necessary to reach those determinations, to the discretion of the Family Part. We hasten to add, however, that the overnight parenting-time issue should be expeditiously managed and adjudicated through imposition of tight time frames. Although full cooperation by both parties obviously serves the interest of their own respective positions, evaluations necessary to determine this issue can be accomplished with or without parental cooperation.
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> [Id. at 47-48.]

The issues in this appeal began to emerge in April 2002, when plaintiff became aware of defendant's plans to enroll D in the American Boychoir School--located in Princeton--as a residential student, beginning in September 2002. The American Boychoir School describes itself, inter alia, as a nonsectarian boarding choir school "dedicated to providing musically talented boys, 9 to 14, with a professional training program as well as a challenging traditional academic program."

The record on appeal reflects that defendant began the application procedure for D's admission to that school in January 2002, but did not notify or involve plaintiff in the selection or decision process. Upon discovering that defendant intended to enroll D in that school--at her cost and expense-- plaintiff presented an application to the Family Part in the form of a proposed order to show cause, which was entered by the court on April 29, 2002, requiring defendant to show cause on May 14, 2002, why she should not be directed to withdraw D's application for admission to the American Boychoir School; why temporary sole custody of D should not be vested with plaintiff; why defendant's

counsel, David F. Salvaggio should not be disqualified from representation of defendant; and why all parenting-time exchanges of D should not occur at a location other than the Chester residence of defendant.

The issue of D's attendance at a boarding school was not a new one. Defendant had previously expressed her intention to enroll D in the St. Thomas Choir School in New York for the 2001-2002 school year, the same school then being attended by defendant's other son, A. In its February 2, 2001 order, the Family Part had denied plaintiff's application to prevent that enrollment. In that portion of his February 6, 2001 letter opinion dealing with the St. Thomas Choir School issue, Judge Harper stated, in pertinent part:

> [T]he Court intends to address the remaining issues of most immediate need. The first would be the application to have defendant withdraw her request for admission of the child to St. Thomas Choir School for the 2001 - 2002 academic year and the plaintiff's request to enjoin her from submitting any further applications or enrolling the child in the boarding school for any other year pending further order of the court. The Court is satisfied that the failure of these parties to agree on a matter so important as the further education of the child, is indicative again of their inability to agree on parenting matters and difference in parenting styles. The persistence of the plaintiff to have things his way is demonstrated by the defendant in her certifications on exchange of the child for visitation and as regards other discussions between the parties concerning the welfare of the child. This conduct clearly evidences a lack of cooperation and discord such that the defendant should be the sole party to make

these determinations and to have custody of D. To have joint legal custody apply, the parties must be able to cooperate and engage meaningfully in discussions regarding parenting issues. See N.J.S.A. 9:2-4(c). New Jersey case law clearly requires this as a fundamental predicate of joint legal custody. See Beck v. Beck, 86 N.J. 480, 498 (1981); Brzozowski v. Brzozowski, 265 N.J. Super. 141, 144 (Ch. Div. 1993). The conduct of the parties as evidenced through certifications in this proceeding and especially the conduct of the plaintiff, clearly indicate to this Court that joint legal custody is totally inappropriate. The defendant right now, is the more appropriate parent to have physical custody, and in fact, is the more appropriate parent to be the sole decision maker regarding D's welfare. Of the two parents, she appears to be better grounded in terms of her emotional stability, parenting skills and better able to carry forward what is needed for D. Her choice of a boarding school for D under the circumstances, as she has explained in her papers before this Court, appears well made, especially in view of the current living arrangements between plaintiff residing and working in New York and the defendant residing in Chester, New Jersey, but working in New York City. If D were to attend the boarding school in New York City, it would be easier for the plaintiff to access his son for visitation and daily contact would be facilitated. D, according to the Guardian ad Litem, is favorably disposed toward the boarding school. The defendant's older son already attends that school. Thus, there would be the ability, if D enrolled, for D to have

> access to his older half-brother. There would also be at least a greater opportunity for plaintiff to have closer contact with his son, which he states is frustrated by his inability to speak to his son through telephonic communication, as claimed in his certification. The frequent contact of the parties with New York and D's desire to attend the boarding school can be accommodated by D attending the school and regular parenting contacts with D by both parents. The quality of education provided by the boarding school and the opportunities for D's educational growth and development appear to be good at St. Thomas.
>
> Accordingly, I am denying the request of the plaintiff to have the defendant enjoined and approving the enrollment of D at the St. Thomas Choir School should the defendant seek to do so for the forthcoming academic year, or any subsequent years.

In her opposing certification dated May 9, 2002, defendant contended that plaintiff threatened administrative personnel at the St. Thomas Choir School to the extent that D was not offered admission. Defendant admitted she did not inform plaintiff of the opportunity to enroll D in the American Boychoir School because of her fear that plaintiff would also attempt to sabotage that enrollment. Additional papers were filed by each party.

On May 16, 2002, an order was entered in the Family Part by Judge Rand, directing defendant not to enroll D in the America Boychoir School or summer camp until further order. The order provided for an interview of D by the judge on June 6, 2002, and further stated:

> Pending further order of the court, the current visitation arrangement shall remain in full force and effect. By May 24, 2002, Mr. O'Callaghan shall provide the court with a revised certification on his new home and a revised plan for parenting time with reply by counsel for Ms. B by May 31, 2002. Mr. O'Callaghan shall have parenting time for Memorial Day Weekend through the Monday of that weekend.

In his May 24, 2002 certification, plaintiff explained that he had relocated his residence from Brooklyn, New York, to Bangor, Pennsylvania. Plaintiff stated the move was initiated in February 2002 and completed as of May 22, 2002. He contended that Bangor provided an appropriate atmosphere for D to reside approximately forty-percent of the time, and further outlined a proposed parenting-time schedule. Defendant also submitted a parenting plan.[1] Plaintiff also filed a certification dated June 5, 2002, objecting to D being interviewed by the court, and objecting to consideration of a parenting plan submitted by defendant.[2]

On June 6, 2002, the judge conducted an interview of D and then entered an order that stated, in pertinent part:

> For this upcoming weekend, and until further order, Mr. O'Callaghan may have an additional overnight into Monday morning when he will return the child to school in Chester Monday morning. Wednesdays 7 PM

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[1] Defendant's parenting plan has not been made a part of the record on appeal; we note its existence because plaintiff references it in his June 5, 2002 certification.

[2] The May 16, 2002 order required defendant to reply to plaintiff's proposed parenting plan by May 31, 2002.

to 7:30 PM the child shall be available for phone contact with his father. If this is not possible, Ms. B shall contact Mr. O'Callaghan to reschedule. The issue of the American Boychoir School is reserved. Ms. B shall communicate via cell phone first and may try the home phone if the cell number does not work. Mr. O'Callaghan's phone number at home shall be held in confidence by Ms. B, not to be given to another party.

On June 14, 2002, the judge placed his decision on the record concerning the American Boychoir School issue stating, in pertinent part:

> The interview with D revealed a very alert, intelligent, and perceptive young man. He appears to be quite well adjusted, loves both his mother and father, and obviously feels somewhat torn because of the ongoing litigation that exists between the parties. He's quite aware of it.
>
> * * * *
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> I'm looking for the best interest of the child in the context of the issue before me and that was, very specifically, should he be enrolled in the boarding school program at the . . . Princeton Boychoir School.
>
> * * * *
>
> During the course of the proceeding, [defendant] indicated . . . that she was so in favor of the child enrolling at the Princeton School, she would literally be willing to

relocate her residence to the Princeton area so as to allow [D] to attend the school on a day basis.

* * * *

During the course of my interview with D, he clearly indicated to me that he wished to attend the school, but he had certain, I will characterize it, concerns about being separated from his mother. He himself indicated the desire that she be close by. In other words, that he not be separated from her during the evenings.

I believe his perception is extraordinary and I believe his insight is extraordinary for a child of his age. I also believe that given the totality of the circumstances, it is not appropriate for the court to allow D to be separated from his family in a boarding school environment for anything near what is proposed by the defendant[.] . . .

* * * *

As a consequence, the court will allow the enrollment. However, only on the condition that [defendant] relocate her residence to a place within a 30-minute drive of the American Boychoir School, Princeton, New Jersey. If she wished to enroll him there, she will be able to do that, but only on a day school basis.

The court observes that it is not reasonable for . . . D to be required to commute from Chester to Princeton every day,

> back and forth. It is just too far. It is at least an hour, possibly longer. It's too long, both in terms of time and distance.

An order memorializing that decision was entered on June 14, 2002.

On June 24, 2002, plaintiff made another application to the court, again using the order to show cause procedure. The court entered an order to show cause on that date, requiring defendant to show cause on July 2, 2002, why the court should not grant plaintiff various relief, including vacating the June 14, 2002 order, placing the child in plaintiff's custody, disqualifying defendant's counsel, requiring defendant to comply with prior orders by taking steps to amend D's birth certificate to name plaintiff as the child's father, and requiring the production of various records. The order specified that it contained no temporary relief, and directed defendant to file a response to plaintiff's requests by June 28, 2002. In his supporting certification, also dated June 24, 2002, plaintiff noted, among other things, that his residence in Bangor, Pennsylvania was forty miles from D's residence in Chester, and that the commute from Bangor to the American Boychoir School in Princeton was eighty miles, as well as being a difficult drive, which would limit or preclude his parenting time with D.

Defendant submitted a certification dated June 28, 2002, disputing the various arguments made by plaintiff, and contending that plaintiff had moved to Bangor and that his law office in New York was closed. Defendant also sought permission to transport D daily to the American Boychoir School from her home in Chester.

On July 2, 2002, the court conducted a hearing[3] and entered an order stating, in pertinent part:

> Ms. B shall inform the court by July 31 if she is moving to the Princeton area to enroll the child in school and the plans for enrollment.
>
> Mr. O'Callaghan may have visitation with the child from July 3 at 11 AM to July 7 at 12 PM.
>
> The parties shall confer by July 12 to get the necessary paperwork to amend the New York birth certificate to include Mr. O'Callaghan as the father.
>
> Mr. O'Callaghan shall provide the court with the block of time he wishes for vacation with the child, after July 20, by July 12[.] . . .
>
> All further relief in the order to show cause is denied without prejudice.
>
> Relist for first week of August.

Plaintiff submitted a further certification to the court dated July 2, 2002, complaining, inter alia, about the results of the July 2, 2002 hearing and characterizing the June 14, 2002 order as "bizarre, unusual, and unprecedented[,]" and that it "validates the alienation C regrettably, promoted by the Family Court through two (2) years of illegal termination/severance."

Additional information was submitted to the court by each party, and the court conducted another hearing on

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[3] A copy of the transcript of the July 2, 2002 hearing has not been made a part of the record on appeal.

August 6, 2002.[4] The court entered an order on that date, requiring defendant to submit to the court, and serve upon plaintiff, proof of a lease for defendant's proposed residence in Ringoes, New Jersey, concerning the American Boychoir School issue. The order also provided, as follows:

> Mr. O'Callaghan may have vacation/visitation time with the child Friday, August 9, 2002 through Friday, August 30, 2002. Exchanges shall be at the Chester Diner, Route 206, Chester, N.J. at 11 AM on both dates.
>
> The parties shall submit to a parenting coordinator, to be appointed by the court, who shall meet with them and develop a parenting plan for the balance of the school year. They shall cooperate with that person's mission.

On August 9, 2002, plaintiff made another application to the court by use of an order to show cause, which was entered by the court on that date, returnable August 15, 2002, directing defendant to show cause why the court should not determine that defendant's proposed residence was not within a thirty-minute drive as required by the June 14, 2002 order; grant plaintiff sole custody; grant plaintiff an evidentiary hearing on custody; provide plaintiff reasonable parenting time; require that the New York birth certificate be amended; and recuse Judge Rand from all further proceedings.

In his moving certification dated August 8, 2002, plaintiff stated that defendant's proposed residence in Ringoes was in excess of fifty miles from the American Boychoir School, which would not comply with the June 14, 2002

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[4] The record on appeal does not contain a transcript of the August 6, 2002 hearing.

order. Plaintiff also contended, inter alia, that Judge Rand's conduct "demonstrates bias and injudicious conduct particularly in unfair efforts to intimidate this Plaintiff *Pro se* father."

By letter to the court dated August 9, 2002, counsel for defendant advised that the scheduled parenting-time exchange on that date at the Chester Diner had not occurred due to an incident in the parking lot of the diner where the child refused to go with plaintiff. By letter to the court dated August 14, 2002, counsel for plaintiff transmitted a copy of a lease agreement between defendant and Paul F. Whiter for the month-to-month rental of premises in Lawrenceville, as an alternative to the Ringoes residence.

On August 9, 2002, the court entered an order appointing Dr. Lee Monday "to evaluate the issues of parenting time between the parties and implement the visitation previously ordered by the Court for holidays, vacations, and the like." The order required both parties to fully cooperate with Dr. Monday, and to equally share the cost of the evaluation.

Plaintiff filed a certification dated August 15, 2002, outlining the problems encountered on August 9, 2002, during the attempted parenting-time exchange, and addressing the various issues raised by the order to show cause. On August 15, 2002, the court conducted another hearing.[5] Although plaintiff was present, neither defendant nor her counsel appeared. The court entered an order on that date, barring defendant from enrolling D in the American Boychoir School pending further order; required defendant to bring D to the court for a possible interview; and scheduled another hearing for August 23, 2002.

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[5] A transcript of the August 15, 2002 hearing is not contained in the record on appeal.

Both parties appeared on August 23, 2003,[6] and the court entered an order stating D was not to be enrolled in the American Boychoir School; directed both parties to cooperate with Dr. Monday; and required Paul F. Whiter, referred to as "Dr. Whiter," to appear at the next hearing, which was scheduled for August 30, 2002.

Plaintiff filed another certification, dated August 29, 2002, in further support of his various applications. Among other issues, plaintiff addressed defendant's proposed residence in Lawrenceville, stating it was a condominium that was also occupied by Dr. Whiter, expressing concern over the proposed "cohabitation arrangement" with a "stranger."

The court conducted a hearing on August 30, 2002, resulting in entry of an order that provided, as follows:

> D shall remain in the Chester schools for this school year (2002-2003). D's music education shall be advanced in many ways (private lessons). Pending further order these parties shall have joint legal custody of D. D shall receive immediate therapeutic counseling with the cost to be shared by the parties. The parties shall recommend a therapist to the court within seven (7) days of today (8/30/02). Mr. O'Callaghan's parenting time shall be re-instituted effective today, August 30, 2002 and he shall return D to Ms. B on Monday morning, September 2, 2002 by 10:00 am. The Chester Library shall be the pick up and drop off point.

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[6] A transcript of the August 23, 2002 hearing is not contained in the record on appeal.

On September 10, 2002, we entered an order granting defendant's application for a stay of the terms of the August 30, 2002 order and stated:

> THE INTENT OF THIS ORDER IS TO PERMIT DEFENDANT, IF POSSIBLE, TO ENROLL D IN THE AMERICAN BOYCHOIR SCHOOL AS A DAY STUDENT FOR THIS SCHOOL TERM. IF DEEMED NECESSARY, WE ALSO DEEM THE NOTICE OF APPEAL TO BE A MOTION FOR LEAVE TO APPEAL, WHICH WE GRANT.

On September 13, 2002, a protective order was entered in the Family Part releasing the report of Dr. Monday to plaintiff upon the condition that it not be copied or released or disclosed to anyone other than a qualified expert for purposes in this litigation.

On October 29, 2002, we issued our unpublished opinion in the prior appeals, affirming the February 2, 2001, March 26, 2001, and June 28, 2001 prior orders entered in the Family Part. At argument, we were informed that additional proceedings have been conducted in the Family Part on the issue of custody and parenting-time. However, by order entered on May 6, 2003, inter alia, we granted plaintiff's application to strike from the record on appeal an order entered on January 15, 2003. At argument, we orally denied defendant's application to supplement the record with certain other proceedings that have occurred in the Family Part since the August 30, 2002 order. We were informed, however, at argument that plaintiff has not had parenting time with D for a significant period of time and that the parties continue to litigate that and other issues in the Family Part.

On or about March 7, 2003, plaintiff filed a motion in this court seeking an order directing that the August 29, 2002

report of Dr. Monday be reviewed and considered on the issues concerning this appeal. On April 1, 2003, we entered an order granting plaintiff's application. In his report, Dr. Monday recommended that plaintiff be granted alternate weekend parenting time with D, in addition to a Wednesday night visit, and that the parties share holidays. Dr. Monday recognized that the parties "have a relationship that can be acrimonious and can lead to legal disputes[,]" and further recommended that the parties "enter into mediation to work through any issues that arise in the future."

On appeal, defendant presents the following arguments for our consideration:

> POINT I
> THE TRIAL COURT ERRED NOT ONLY WHEN IT, SUA SPONTE, AWARDED THE PARTIES JOINT CUSTODY WITHOUT ANY CUSTODY COMPLAINT PENDING AND WITHOUT A HEARING, BUT ALSO WHEN IT PROHIBITED D FROM ATTENDING THE AMERICAN BOYCHOIR SCHOOL.
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> POINT II
> THE COURT ERRED WHEN IT ALLOWED ITS PERSONAL BIAS AGAINST BOARDING SCHOOLS AFFECT ITS DECISION, WHEN IT ABDICATED ITS DECISION MAKING POWER TO DR. MONDAY AND WHEN IT MICRO-MANAGED THE CASE AS A RESULT OF THE PLAINTIFF'S INCESSANT FILINGS.

After analyzing the record in the light of the written and oral arguments advanced by the parties, we conclude that the August 30, 2002 order, changing the custodial

arrangement from one of sole custody vested in defendant to a joint legal custodial relationship, without a hearing, was unwarranted.

The issues of custody and parenting time were last determined prior to the August 30, 2002 order after a long procedural history of several hearings and resulting orders entered in the Family Part beginning on July 28, 2000 and ending on June 28, 2001. Those orders, which we affirmed in our prior unpublished opinion decided on October 29, 2002, vested sole custody of D with defendant, and recognized this litigation as a high-conflict case.

It is axiomatic that prior to considering a change in custody, plaintiff was required to demonstrate a substantial change in circumstances. Chen v. Heller, 334 N.J. Super. 361, 380 (App. Div. 2000); Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993). Moreover, in light of the prior procedural history and rulings by the Family Part, a plenary hearing was required prior to effecting any change in the custodial relationship. See Peregoy v. Peregoy, 358 N.J. Super. 179, 185 (App. Div. 2003); P.T. v. M.S., 325 N.J. Super. 193, 214 (App. Div. 1999); Mackowski v. Mackowski, 317 N.J. Super. 8, 11-12 (App. Div. 1998).

In a high-conflict custody and parenting-time case where the parties have an inability to communicate or act jointly in the best interests of their child, such as here, joint custody is generally inappropriate since it usually increases and intensifies the conflict, all to the detriment of the child. See Mamolen v. Mamolen, 346 N.J. Super. 493, 502 (App. Div. 2002); Nufrio v. Nufrio, 341 N.J. Super. 548, 555 (App. Div. 2001). There were also issues of material fact in dispute on the issue of D's attendance at the American Boychoir School that required a plenary hearing. Moreover, consideration of expert opinion must be in accordance with R. 5:3-3(d) (communications with an expert must be upon prior notice to the parties and their attorneys who shall be afforded

an opportunity to be present and to be heard during any such communication between the expert and the court); R. 5:3-3(e) (providing the parties the right to discovery); and R. 5:3-3(f) (affording the parties the right to cross-examination of the expert).

The issues raised by plaintiff in his cross-appeal essentially reargue those issues already decided in our previously-issued unpublished opinion in A-4782-00T3 and A-6659-00T3, and are without merit.

Accordingly, we are constrained to reverse the August 30, 2002 order and remand the matter for a plenary hearing on the issue of joint legal custody and D's attendance at the American Boychoir School. Although the record on appeal does not provide us with the specifics, we recognize that additional proceedings have taken place in the Family Part since entry of the August 30, 2002 order that may bear upon these issues. In that connection, we draw the parties' attention to R. 2:9-1(a), which deprives the trial court from acting further on the issue on appeal except to the extent of applications for enforcement, unless directed by this court. See Rolnick v. Rolnick, 262 N.J. Super. 343, 365-66 (App. Div. 1993).

Reversed and remanded on defendant's appeal; affirmed on the cross-appeal.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4782-00T3 and A-6659-00T3

DANIEL J. O'CALLAGHAN,

Plaintiff-Appellant,

v.

V J B,

Defendant-Respondent.

Argued: October 2, 2002 - Decided: October 29, 2002

Before Judges Fall and Weissbard.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket Number FD-14-581-00.

Daniel J. O'Callaghan, appellant, argued the cause pro se.

No brief was filed by respondent.

PER CURIAM

In two separate appeals calendared together, which we consolidate for opinion purposes, plaintiff, Daniel J. O'Callaghan, appeals from several orders entered in the Family Part adjudicating issues pertaining to custody and parenting time of his son, D T. B. Defendant, V J B, is the mother of D.

D was born on June 19, 1992, in New York. Plaintiff and defendant were never married. Plaintiff, a New York attorney, is married and resides in Brooklyn, New York. Defendant is employed as a teacher in the New York City School System and resides, with the child, in Chester, New Jersey. Defendant also spent time with D in New York at the Manhattan apartment of J V, father of her other son, A V. Defendant and J were married in 1986 and a judgment of separation was entered between defendant and J by a New York court in 1995, under which defendant was given the right to occupy the Manhattan apartment. The parties herein resided together in that Manhattan apartment, with D, from early 1992 until mid-1994, when they separated, plaintiff returning to live with his wife in Brooklyn. Defendant moved, with D, to her New Jersey residence in 1996.

In order to fully understand the context of the issues presented in these appeals, a detailed recitation of the procedural history is necessary. On June 22, 2000, plaintiff filed a pro se non-dissolution complaint in the Family Part in Morris County, seeking parenting time with D, as well as an adjudication establishing his paternity of D. A hearing was scheduled for July 14, 2000.

Plaintiff retained counsel and on June 23, 2000, filed a motion, returnable July 14, 2000, seeking an order awarding him temporary custody of D or, in the alternative, establishing a liberal and reasonable parenting-time schedule with D, to include weekday, weekend, summer, and telephonic time; requiring the parties to submit parenting plans pursuant to R. 5:8-5; setting a child support obligation

to be paid by the non-custodial parent; and granting plaintiff an award of counsel fees.

The hearing was re-scheduled to July 17, 2000 and, on that date, the court entered an order carrying the case, and plaintiff's motion, to July 28, 2000. The order, pursuant to a stipulation of the parties, also declared plaintiff to be D's father and set interim parenting time for plaintiff, consisting of one eight-hour session during the day and various telephonic communication. The intervening certifications filed by the parties reflected significant animosity between them and each set forth various allegations concerning the care and safety of D.

On July 28, 2000, a hearing was conducted by Judge Harper in the Family Part, resulting in entry of an order, continuing custody of D with defendant; requiring plaintiff to pay defendant the sum of $60 each week in child support, effective July 14, 2000; and further providing, as follows:

> 1. Parties agree that Plaintiff's name will be added as the father on the child's birth certificate within 30 days.
>
> 2. Attorneys to work out specifics with regard to the automobile and insurance.
>
> 3. Parties are directed to undergo a Best Interest Investigation and home inspection. Parties to fully cooperate.
>
> 4. The child is to be interviewed in connection with the Best Interest Investigation.

5. Defendant's motion for discovery as to Plaintiff's financial situation is granted - Both parties are to exchange financial information as follows:

a. prepare and serve financial interrogatories [within] 14 days.

b. answer interrogatories [within] 30 days of receipt of interrogatories.

c. depositions if necessary to be scheduled within 30 days of receipt of answers to interrogatories.

6. Parties to submit proposed visitation schedules to court by [August 4, 2000].

7. Child to be interviewed [August 10, 2000 at] 3:00 p.m. by Judge Harper.

The judge interviewed D on August 10th and, on August 11, 2000, conducted a conference call with both counsel, during which the judge directed interim parenting time for plaintiff with D and scheduled a further hearing for August 22, 2000, in the event the parties were unable to resolve the parenting-time issues. However, no written order was entered at that point specifying the parenting time.

On or about August 15, 2000, plaintiff filed a substitution of attorney, reflecting his pro se representation. On August 18, 2000, plaintiff sought emergent relief through a proposed order to show cause, supported by his certification dated August 14, 2000. Plaintiff alleged defendant refused to

provide him the agreed-upon parenting time with D, outlined a detailed history of the parties' relationship and, for various reasons, contended defendant was an inappropriate caretaker for D.

As a result of plaintiff's application, and in the absence of Judge Harper, Judge Miniman entered an order on August 18, 2000, directing that plaintiff be afforded continuous parenting time with D between August 18 and August 22, 2000, on which date the court would consider the balance of plaintiff's application.

On August 22, 2000, both parties appeared in the Family Part before Judge Harper. An order was entered, continuing the matter to August 25, 2000. D was returned to the physical custody of defendant. Additional certifications were filed and the court conducted a hearing on August 25, 2000. Defendant provided the court with a report from Jeannette Lofas, a New York social worker and counselor, dated August 24, 2000. Lofas apparently had seen both parties and D, intermittently, since November 1991, and had met with D subsequent to D's parenting-time session with his father during the August 18 to August 22, 2000 period. In her report, Lofas recommended against overnight parenting time in plaintiff's home "until [D] feels more comfortable about staying overnight." An order entered on August 25, 2000, provided for appointment of a guardian ad litem for D; appointment of Dr. Mathias Hagovsky, a psychologist, as therapist for D; directed both parents to meet with Dr. Hagovsky and cooperate in all aspects of D's therapy with regard to parenting-time and custody issues; specified daytime parenting time for plaintiff with D; and continued the matter until a further hearing to be held on September 15, 2000.

On August 30, 2000, plaintiff made another application for emergent relief through submission of a proposed order to show cause, supported by his certification dated August 28, 2000. Plaintiff contended Judge Harper's reliance upon the report of Lofas was inappropriate, and that plaintiff was unfairly prevented from providing relevant information to the court. In his application, plaintiff sought, inter alia, a stay of the order appointing a guardian ad litem and therapist, disqualification of Lofas, and restoration of his overnight parenting time.

The court entered an order to show cause on August 30, 2000, returnable on September 8, 2000, and a separate order, also dated August 30, 2000, appointing Ann Scucci, Esq. as guardian ad litem for D, directing Scucci to "interview the parties and the child and make recommendations to the Court concerning the best interest of the child." Prior to the return date of the order to show cause, defendant filed a certification dated September 7, 2000, expressing willingness to work with the court-appointed guardian ad litem and therapist, and asserted that plaintiff "is a much too tightly-wound 'control freak' who insists on getting his way and personally attacking everyone who disagrees with him."

On September 8, 2000, a hearing was conducted by Judge Harper concerning the issues addressed in the August 30, 2000 order to show cause. An order entered on that date continued the appointments of Hagovsky and Scucci; adjourned the hearing to September 15, 2000; permitted plaintiff to reply to defendant's certification; and provided for further daytime parenting time for plaintiff with D.

Plaintiff submitted a reply certification dated September 14, 2000, criticizing Judge Harper's handling of

the parenting-time issues, criticizing defendant's attorney, and attaching a copy of a complaint filed by plaintiff against Lofas in the Supreme Court of New York, Kings County, alleging, inter alia, a breach of the psychologist-patient privilege and seeking damages.

On September 15, 2000, another hearing was conducted before Judge Harper in the Family Part. Thereafter, a significant dispute arose concerning the content of the form of order submitted by defendant's counsel. Additionally, plaintiff sought reconsider-ation of the judge's rulings, supported by his September 22, 2000 certification.

On or about October 9, 2000, plaintiff filed a motion, returnable on November 10, 2000, seeking custody of D and an order holding defendant's attorney in contempt, based upon that attorney's alleged instructions to plaintiff to violate the terms of plaintiff's court-ordered parenting time.

On October 23, 2000, plaintiff presented an emergent application to the Family Part upon submission of an order to show cause seeking, inter alia, the recusal of Judge Harper, custody of D or, alternatively, overnight parenting time pending a plenary hearing. In Judge Harper's absence, the application was considered by Judge Wilson, who entered an order on October 23, 2000, finding "no basis for interlocutory relief on the basis of irreparable injury, this matter is scheduled as a motion." The request for emergent relief, as requested in the order to show cause signed by Judge Wilson, was made returnable on October 31, 2000. All other pending matters were scheduled before Judge Harper for hearing on November 17, 2000.

On October 26, 2000, an order was entered in this court denying plaintiff's application for emergent relief.

On October 27, 2000, Judge Harper entered an order, prepared by the court, memorializing his findings and rulings at the September 15, 2000 hearing. That order continued the appointments of Scucci and Hagovsky; directed the parties to consult concerning possible agreement for the appointment of an alternative therapist who participated in defendant's insurance coverage plan or, in the absence of agreement, continued the appointment of Hagovsky; permitted plaintiff to conduct discovery concerning the interview of D by Lofas; denied, without prejudice, plaintiff's application to depose defendant's attorney; denied plaintiff's application for a plenary hearing concerning the letter submitted to the court by Lofas, but permitted that letter to be reviewed by any psychologist at the request of either party; denied plaintiff's application to disqualify Lofas; denied plaintiff's application to be present during the court-appointed psychologist's interview of D; denied plaintiff's request for overnight parenting-time sessions pending the court's receipt of reports from the appointed guardian ad litem and psychologist; directed the court-appointed psychologist to conduct "evaluations of both parties and the child, addressing parenting time of the child with Plaintiff, including overnights, as well as any potential parental alienation[;]" determined there was no basis for the court to intervene based upon plaintiff's concerns for safety of the child; and denied all other requests for relief not addressed in the order.

On November 2, 2000, Judge Harper entered an order denying the relief requested by plaintiff in the order to show executed on October 23, 2000, and continued the parenting-time schedule previously set forth in the August 25, 2000 order. In doing so, the judge attached the following findings of fact and conclusions of law to the executed order:

1. The entering of an Order based on the September 15, 2000, proceedings, was postponed for numerous reasons. As an Order could not be entered on the day of the proceedings, as the law clerk was unavailable with other clients, this Court requested that an Order be submitted to the Court reflecting the outcome of the instant proceedings. Defendant's attorney submitted the proposed order on September 19, 2000. Objections, as well as a request for reconsideration, were received by this Court on September 22, 2000. As the proposed order and the objections were contradictory, it was necessary that the audio tape of the September 15, 2000, proceedings be obtained to ensure the accuracy of the Order which would be entered regarding those proceedings. Due to the high volume of cases and emergent matters on the calendar, the audio tape of the proceedings was not reviewed until October 27, 2000. Upon such review, an Order was immediately filed and mailed to the parties.

2. Based upon previous submissions of the parties, the Court is satisfied that the safety and well-being of the child, D T B, is not in danger and Defendant is appropriately providing for the child's care and safety.

3. The Court adopts as its findings paragraphs 9(A) and 9(B) of Defendant's Certification dated August 21, 2000.

4. As concerns have been brought to the Court regarding visitation, including overnights, the Court deemed it necessary to appoint both a *guardian ad litem* and a psychologist. Pending the receipt of reports from both of the Court's appointees, overnight visitation of the child, D T B with Plaintiff will not occur.

5. The Court is aware of Plaintiff's transportation problems and therefore directs that Defendant is to provide the transportation for Plaintiff's visitation with the child, D T B, on Saturdays from 10am to 6pm, in accordance with the Order issued on August 25, 2000.

On November 15, 2000, plaintiff moved for a stay of the November 2, 2000 order. That application was denied by Judge Harper in an order entered on that date, accompanied by the following findings of fact and conclusions of law:

1. The Court adopts as its findings numbers one through five of its findings of fact and conclusions of law attached to the Court's Order filed and entered on November 2, 2000.

2. In accordance with the Court's Order filed and entered on November 2, 2000, the Court has determined that there is no irreparable injury to the minor child as visitation of Plaintiff with the minor child is to proceed as Ordered on August 25, 2000, on

Saturdays from 10am-6pm, with Defendant providing transportation, pending further Order of the Court.

3. Pending further Order of the Court, and receipt of reports from both the Court appointed *guardian ad litem* and psychologist, overnight visitation of Plaintiff with the minor child will not occur. There is much high conflict between these parties which has so seriously impacted the child as discussed in the certifications filed by the parties and others, and these parties are so litigious and apparently incapable of recognizing what is in the best interests of their son without the intervention of a *guardian ad litem* and psychologist that it is necessary to appoint a *guardian ad litem* and a psychologist to bring this matter to an appropriate resolution.

4. Unfortunately, the Court's effort to bring such assistance to the parties is misperceived by the Plaintiff as an effort toward delay and not recognized as needed under the circumstances. Limited visitation will continue until the Court receives an impartial assessment and an accurate account of what is in the child's best interest. There is no irreparable harm as Plaintiff claims.

By letter dated November 16, 2000, the court adjourned the motions scheduled for November 17, 2000 and rescheduled the matters for a hearing to be held on December 8, 2000. Plaintiff then filed an emergent application seeking

reconsideration of the adjournment, which was denied by an order entered on November 17, 2000. Judge Harper also addressed plaintiff's application for his recusal in findings of fact and conclusions of law attached to the November 17, 2000 order, stating:

> The plaintiff, Daniel J. O'Callaghan, an attorney at law of the State of New York who appears "pro se" herein, has requested that this Court recuse itself from hearing further on this matter. Apparently, the plaintiff contends that he has been seriously aggrieved by this Court's rulings and prejudiced as far as his overnight visitation with the parties' son, D, is concerned. This court has directed that visitation with the plaintiff continue, but that overnight visitation be suspended, for reasons previously stated on the record and now reiterated herein. The overnight visitation was suspended because of conflicts between the parties and the impact same is having upon the child as evidenced by certifications filed with the Court in connection with the numerous applications brought before this Court. Visitation was limited because the defendant expressed concerns over the contents of the so-called "Lofas" report, and in reliance upon the Court's interview of the child who at the time had been positively disposed towards visitation with his father. Thereafter for some apparent reason visitation with dad became a problem and a concern for D.
>
> Obviously, the child is squarely in the middle of two squabbling and contentious parents who

cannot, without the intervention of a guardian ad litem and a psychologist, perceive the best interests of their son nor understand the injury the contentiousness visits upon the child. Their certifications at times are rife with conflicting statements about what is happening to D and why and what appears to be best for him. The Court is also concerned that the purportedly well intentioned efforts of the defendant to protect and safeguard her son while he is away from her with his father are perceived by the plaintiff (who appears suspicious of her behavior and motives) to suggest that she is engaging in parental alienation. This Court is concerned about that claim and plaintiff's perceptions especially when they lead him to resort to personal attacks upon defendant's counsel and this Court.

This is a "high conflict case" which now threatens, if not properly managed, to engulf defendant's counsel and the Court in efforts to divert attention from the best interests of D to plaintiff's claims of prejudicial and unfair treatment by those who disagree with him. His efforts to have this Court recuse itself are obviously designed to seek another judge who will make rulings more favorable to plaintiff's position. As discussed below there is no basis for recusal and this Court will not reward the plaintiff's efforts to forum shop. Plaintiff must cooperate with the guardian ad litem and the psychologist, continue with his visitation

as ordered and reduce the level of conflict. To do otherwise, is not in the best interests for D.

Under R. 1:12-1 a judge shall be disqualified on the court's own motion and shall not sit on a matter due to a close family relationship with a litigant or attorney, or due to prior representation, personal interest in the outcome or such other reason which might preclude a fair and unbiased hearing and judgment or which reasonably might lead counsel or the parties to believe so.

In this case, plaintiff has shown absolutely no proof of any one of the disqualifiers nor would anyone reasonably be lead to believe that an unbiased hearing or judgment could not be achieved. This Court has no personal, family or financial interest in this matter nor any such connection with the parties, counsel or anyone associated with this case, plaintiff's claims to the contrary notwithstanding. For these reasons plaintiff's motion to have the court recuse itself [is] denied.

The Court has rescheduled all pending motions to December 8, 2000 because plaintiff had not been properly served with defendant's motion purportedly returnable October 20, 2000,[1] per

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[1] Although the record on appeal does not contain a copy of the referenced motion by defendant, it appears from a review of defendant's October 4, 2000 certification contained in the record that defendant's

(continued...)

> the Rules of Court and the Court's desire to hear and decide all pending motions expeditiously after the plaintiff had been duly served and had properly filed opposing papers. All parties must be properly served with all pleadings, motions, orders to show cause, etc., and will be given appropriate and necessary time to respond to ensure a fair and impartial hearing and determination in this case.

On or about November 21, 2000, plaintiff filed a certification and memorandum in support of his application for an order to show cause, requesting Judge Harper to reconsider the denial of plaintiff's recusal application. Plaintiff also sought various other relief, including seeking an order precluding defendant from enrolling D in the same boarding school attended by his brother, A V.

On December 4, 2000, this court entered an order denying plaintiff's application seeking leave to appeal from the November 17, 2000 order and for a stay.

Judge Harper conducted a hearing on all pending applications on December 8, 2000, and entered an order on December 13, 2000, that provided, in summary, as follows:

> 1. Plaintiff's application for the recusal of Judge Harper is denied for the

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(...continued)
motion concerned parenting-time transportation; plaintiff's due answers to defendant's financial interrogatories; title to a motor vehicle; proof of maintenance of life insurance naming the child as beneficiary; and counsel fees and costs.

reasons set forth in the court's findings attached to the November 17, 2000 order;

2. Plaintiff's motion to find defendant in violation of litigant's rights is granted, and defendant is directed to comply with all court orders concerning plaintiff's parenting time;

3. Plaintiff's application to impose sanctions against defendant's counsel is denied;

4. Pending further order of the court, plaintiff's parenting time with D was specified;

5. Pending further order, plaintiff shall pay $90 each week in child support, plus $10 each week toward liquidation of $835 in arrears. Financial discovery is to go forward as ordered;

6. The parties are to cooperate with the *guardian ad litem* and court-appointed psychologist to allow expeditious completion of their reports;

7. Plaintiff is to file a motion with Judge Wilson to ascertain that judge's findings and basis for entry of the October 23, 2000 order;

8. Plaintiff's request for attorneys' fees and costs is denied. The court reserves

decision on defendant's request for counsel fees and costs until conclusion of the matter;

9. All other requests for relief not addressed in the order are denied.

The judge attached the following statement to the December 13, 2000 order, representing his factual findings and conclusions of law:

1. A plenary hearing regarding the certification submitted by Ms. Jeanette Lofas is not necessary. (See copy of certification attached hereto and made a part hereof as Exhibit A). The certification was not the impetus behind the Court's decision to limit Plaintiff's visitation to daytime hours, but rather only a factor among the totality of the circumstances presented to the Court at the time. The Court even offered Plaintiff discovery on circumstances surrounding the certification of Ms. Lofas, set forth in paragraphs two (2) and three (3) of this Court's order and findings dated October 27, 2000. To date, neither Plaintiff nor Defendant's attorney has come to this Court with a case management order concerning a timetable for depositions or discovery on the matter. Plaintiff has elected to pursue discovery regarding "Lofas" in a New York litigation which he has instituted against her.

2. Pending further Order of the Court until reports have been received from the *guardian ad litem* and psychologist, Defendant will remain temporary physical custodian of the parties' minor child, while the parties remain joint legal custodians.

The parties are to cooperate with the Court appointed *guardian ad litem*, Ann T. Scucci, Esq., and Dr. Mathias Hagovsky, Ph.D., psychologist, such that said persons are to complete their reports as expeditiously as possible. The Court has received a preliminary report from Ms. Scucci (a copy of which is attached hereto and made a part hereof as Exhibit B).

3. The Court continues to note that Plaintiff's parenting time has not been suspended, but is to take place absent overnights for reasons previously stated on the record.

4. As previously stated on the record, the Court appointed the *guardian ad litem* and psychologist due to the contradictory certifications and the nature of the allegations contained therein provided by the parties regarding the events surrounding visitation of the child with Plaintiff, after this Court had approved overnight visitation for the child with Plaintiff. The high degree of conflict between these parties is continuing and clearly evident. . . . The Court continues to believe that the appointments are necessary to help the Court determine D's best interests, and will rely on the reports from both the *guardian ad litem* and Court appointed psychologist, as well as other relevant evidence, in order to determine what exactly is in the child's best interests.

5. The Court appreciates the fact that Plaintiff has voluntarily increased his child support payments to ninety dollars ($90.00) weekly. To that effect, arrears have been fixed at eight hundred thirty-five

dollars ($835.00) in view of Defendant's statement in paragraph 9, child support, of her Certification dated December 3, 2000, which is incorporated by reference and made a part hereof.

6. Plaintiff's request that Defendant's counsel, David F. Salvaggio, Esq., be sanctioned is without merit. There is no competent evidence on the record which would support such a finding by this Court.

7. Plaintiff has been denied visitation previously ordered by this Court as a result of Defendant's overly protective efforts to safeguard the welfare and safety of the child because of her perceived fears and concerns many of which appear to be amplified because of her lack of trust in Plaintiff and her doubts in his parental judgment and parenting skills. Defendant must abide by this Court's visitation orders and provide the child to Plaintiff for Court ordered visits or risk further sanction by this Court. The Court ordered visitation schedule shall be enforced.

The December 6, 2000 preliminary report from the guardian ad litem, referred to in the Judge's findings, noted that D likes his father and said "it would be 'okay' if he stayed overnight sometimes." However, Scucci stated her attempt to meet with plaintiff was unsuccessful even though she had left at least one message at his office for him to telephone her. In summary, Scucci stated, in pertinent part:

> I am unable to offer the Court concrete recommendations until these meetings are scheduled and completed. At this juncture, I do recommend that visitation be scheduled in

> a fashion so as to minimize the burden of travel on D. I also recommend counseling for D and parenting mediation for the parents, who have no present ability to work with each other (based upon D's account.)

Scucci asked that the court direct the parties to cooperate with her efforts to allow her to complete the assignment.

By letter to Scucci dated December 13, 2000, with copies to both parties, Judge Harper requested her to contact plaintiff in light of plaintiff's contention that Scucci had not attempted to contact him.

By letter to Scucci dated December 21, 2000, plaintiff asserted that her representations to the court that she had contacted his office were not true and he objected to her appointment and performance as guardian ad litem. Scucci replied to plaintiff by letter dated December 26, 2000, expressing her desire to assist all parties in resolving the matter, and requesting that plaintiff arrange to meet with her, "even if that means meeting with you and D together at your home in New York." Plaintiff replied to Scucci by letter dated December 29, 2000, asking her to be available for a hearing in Judge Harper's courtroom scheduled for January 5, 2001. The referenced hearing was the scheduled date for plaintiff's motion for reconsideration of the December 13, 2000 order. Plaintiff also filed a separate motion seeking reconsideration of all prior orders.

Plaintiff filed a certification dated December 30, 2000 in support of his application for reconsideration. In that certification, plaintiff criticized Judge Harper, defendant, defendant's attorney, Scucci, and Lofas.

Defendant filed a cross-motion, seeking an assessment of counsel fees against plaintiff; amplification of the court's finding concerning defendant's non-compliance with plaintiff's parenting time; scheduling of plaintiff's future parenting-time sessions; dismissal of plaintiff's complaint for his failure to meet with the guardian ad litem or with Hagovsky; reconsideration of the child-support award by increasing it to the sum of $137 per week; an order holding plaintiff in violation of litigant's rights for failure to provide answers to the financial interrogatories; and determining the appropriateness of plaintiff's request for production of documents. By letter to both parties dated January 3, 2001, the court adjourned all pending matters to January 19, 2001.

By letter to Judge Harper dated January 4, 2001, plaintiff objected to the adjournment and requested various relief, including an order directing the disqualification of Scucci and defendant's counsel, and establishing his parenting-time schedule between January 4 and 19, 2001. On January 4, 2001, Judge Harper entered an order specifying plaintiff's parenting-time sessions with D pending the January 19th hearing and advised that all other matters would be addressed on the date of the adjourned hearing. At plaintiff's request, the scheduled January 19th hearing was adjourned and rescheduled to February 2, 2001.

Plaintiff then made another application for emergent relief, again seeking the recusal of Judge Harper and the disqualification of defendant's attorney, Scucci, and Hagovsky, and the establishment of overnight parenting-time sessions. Plaintiff contended that an attorney, Michelle Hart, Esq., appeared as "of counsel" on both the letterhead of defendant's counsel and Scucci, necessitating the disqualification of both Scucci and defendant's counsel. An

order to show cause was entered on January 18, 2001, directing that those issues be considered at the rescheduled February 2, 2001 hearing.

Based upon an additional application by plaintiff, an order to show cause was executed on January 29, 2001, returnable February 2, 2001, directing defendant to show cause why an order should not be entered directing discovery concerning plaintiff' applications for disqualification, consisting of the production of various documentation and the scheduling of a plenary hearing on those disqualification requests.

On January 23, 2001, the Supreme Court entered an order denying plaintiff's motion to expand the record, and denied plaintiff's motion for leave to appeal from our December 4, 2000 order.

On February 2, 2001, Judge Harper conducted a hearing on all pending applications, and entered an order on February 6, 2001 that provided, in summary, as follows:

1. Plaintiff's motions for reconsideration are denied.

2. Plaintiff's orders to show cause regarding the boarding school, disqualifications, and discovery on such disqualification requests are denied.

3. The court imposed the following sanctions against plaintiff:

(a) plaintiff's complaint for custody

and/or visitation is dismissed; and

(b) plaintiff is ordered to pay defendant's counsel the sum of $643.45 within thirty days.

4. The court-appointed guardian ad litem, Ann T. Scucci, Esq. and court-appointed psychologist, Dr. Mathias Hagovsky, are relieved of their duties.

5. Parenting time for plaintiff with D shall proceed and the parties shall share transportation. Plaintiff's parenting time shall consist of each Saturday from 10:00 a.m. to 6:00 p.m., taking place in New York one week and in New Jersey the next week and alternating thereafter in that fashion. Any make-up parenting time due to cancellation, upon forty-eight hours prior notice, shall take place on the succeeding Sunday.

6. Although plaintiff's complaint is dismissed, the court "uses its discretion to leave the child support order of ninety dollars ($90) weekly in place."

7. Defendant's application for amplification of the reasons for concluding she failed to comply with the parenting-time order is granted, such reasons set forth in the court's letter opinion.

8. Plaintiff is to comply with outstanding discovery within thirty days. Defendant is to provide plaintiff with D's school and medical records within 30 days. All other requests for discovery are denied.

In support of this order, Judge Harper issued a sixteen-page letter opinion dated February 6, 2001, addressing each issue and providing, in pertinent part:

> First, to the threshold question of recusal, the Court respectfully directs the parties to its decision of November 17, 2000 which is already a matter of record in this matter. The Court hereby reaffirms its findings of fact and conclusions of law and incorporates same herein by reference as if the same were fully set forth herein at length. The plaintiff also apparently has sought to effectuate this Court's disqualification by filing a grievance against the same with the Advisory Committee on Judicial Conduct. Pursuant to the Rules of Court, the filing of allegations concerning a judge shall not automatically require the judge's recusal from a matter involving the grievant. See R. 2:15-24. This Court deems the plaintiff's continued request for reconsideration of the Court's earlier recusal decision not to require the immediate disqualification of this Court. The continued participation by the plaintiff before this Court subsequent to the filing of the aforesaid grievance is found by this Court to be an election to proceed and to receive this Court's

determination on the recusal matter and others that are outstanding. Henceforth, the court will proceed and render its decision.

Pursuant to R. 4:49-2 the Court Rules provide, in pertinent part, that a motion for reconsideration seeking to amend or alter an order shall state with specificity the basis on which it is made including a statement of matters or controlling decision which counsel believes the Court has overlooked or to which it has erred. In the instant request to again have this Court recuse itself and to reconsider its earlier determinations, the plaintiff has advanced nothing new but seeks only to have the Court again review the points earlier advanced. It appears that the plaintiff believes through dogged persistence, he will convince the Court of the merit of his views and the error of its ways. However, based upon the standard by which this Court must be guided, it hereby affirms and incorporates its prior findings and conclusions of law herein, all of which were previously made a matter of record on the dates hereinabove specified. Therefore, the Court denies the request for reconsideration.

The Court is also required to comment on certain remarks of the plaintiff which were placed upon the record in the hearing of February 2, 2001. The plaintiff contends that the parties' child D was traumatized by the withdrawal of Family Court resources by this Court, and that the Court is blaming the

victim, that is Mr. O'Callaghan. He contends this Court has abandoned the child. However, Mr. O'Callaghan conveniently omits the fact that it was this Court that had directed that visitation proceed after an interview with D which has been videotaped and a telephone conference with counsel, William T. Rittley, Esq. then representing the plaintiff and Daniel Salvaggio, Esq. representing the defendant. After the Court had found that visitation including overnights was appropriate, and the visitation it previously ordered did not come about, the plaintiff filed an order to show cause, which was heard by Judge Miniman in the absence of this Court who was unavailable because of vacation. Judge Miniman made a determination that immediate visitation for several days take place because of the denial of visitation to Mr. O'Callaghan by Ms. B, the defendant. That decision is a matter of record as well. After that Ms. B through her pleadings and an appearance before the Court made this Court aware of the so-called "Lofas letter" which is really in the form of a certification. The certification is from a therapist who had seen the child and the defendant alleging trauma done to the child because of Judge Miniman's order of immediate extended overnight visitation as a make up for that visitation previously denied or frustrated by defendant. This Court made its decision for reasons previously stated on the record and affirmed in its decision of December 13, 2000, directed restricted visitation and the appointment of a Guardian

ad Litem, Ann Scucci, Esq. and a psychologist, Dr. Matthias Hagovsky of Livingston, New Jersey. The Court ordered that there be a quick response to its order and that the parties cooperate. Thereafter, rather than cooperate, the plaintiff filed a series of challenges to the Court's determination and sought to stay the actions concerning the appointments and to have this Court rescind the same. Much energy was expended by the plaintiff, and thereafter the defendant, in dealing with these challenges. Ms. Scucci was made aware as she indicated on the record on February 2, 2001, that this Court was desirous of her proceeding as expeditiously as possible and she was called to the Court so that she could meet the parties and begin the process of gathering information to assist this Court in deciding the outstanding issues. This occurred on September 8, 2000.

This Court is satisfied from the plaintiff's conduct and the defendant's certifications that at no time did Mr. O'Callaghan cooperate with this Court's efforts to have the Guardian as Litem discharge her duties, and further, to have a Psychologist assess the parenting abilities of the parties and provide an evaluation. The plaintiff has some mistaken notion that the Court should enforce its own orders sua sponte. The Court has responded appropriately in this case to the requests of the parties for its intervention. The Court appointed qualified professionals to assist it in fact-finding only to have its efforts constantly

frustrated by the plaintiff who sought to challenge the appropriateness of the appointments and who resisted cooperating. Incredibly, plaintiff now claims that it was the Court who failed to see to it that the professionals had completed their assignments in a timely fashion. The plaintiff apparently fails to comprehend the inconsistency of his position and seeks only to blame the Court instead of himself for the failure of the professionals to complete their assignments. It is evident that Mr. O'Callaghan is seeking to delay and frustrate the Court's efforts to gather facts about this matter through legal maneuvering and challenges. There is no other reasonable or appropriate explanation.

Plaintiff's argument is circular. He seeks to point to everyone else as the cause of the delay. I daresay, if he had cooperated, met with Ms. Scucci, and allowed her to complete her work, we would have had her report by now. The same is true with Dr. Hagovsky. It becomes evident that the plaintiff is obsessed with legal challenges and cannot see that if he would only allow the Court appointed professionals to do their work and submit to this fact-finding effort, the Court then would be in a position to address the issue about which he complains, namely, whether the child has been traumatized, and if so, by whom. He blames the Court for the delay which he has occasioned.

His distrust of the Court and others is evident in his papers and his claim of "feeling prejudiced" every time he comes in this Court for a determination. It is unfortunate that he feels the way he does, but that feeling does not dissuade this Court from doing its duty to render its determination in the best interest of D.

The Court also wishes to note that it has entered orders, such as its order of October 27, 2000, which recognized the initial difficulty for the parties that the Court appointed psychologist was not apparently a participant in the defendant's insurance coverage and there would be additional costs from the evaluation. The Court, in order to accommodate the parties, allowed for the appointment of another psychologist covered under the insurance program if the parties could agree; if not, Dr. Hagovsky remained the court appointed expert. In the same order, the Court clarified the psychologist's role and directed that: "the psychologist, among any issues he/she deems appropriate is also to conduct an examination/investigation including but not limited to the evaluation of both parties and the child, addressing parenting time of the child with plaintiff, including overnights as well as any potential parental alienation." The claim has been made by Mr. O'Callaghan that the defendant was seeking to alienate the child from him. The order also provided that the plaintiff was not permitted to be present at the psychologist's interview/examination of the

child as plaintiff had requested, and further the psychologist was to conduct the interview/examination as he/she sees fit and is to obtain input from the parties as appropriate. The so-called "Lofas letter" was not sealed and could be reviewed by the psychologist as he/she deemed necessary.

Accordingly, safeguards were in place by the Court under its order of October 27, 2000, from the so-called "taint of the Lofas letter" as claimed by the plaintiff. There is absolutely no reason, except the plaintiff's distrust of the Court and the defendant, for him to believe that the Lofas certification could be so potent as to sway a reputable psychologist who had interviewed the parties and the child as to the appropriateness of Mr. O'Callaghan as a parent or as to the wisdom of overnight visitation for the child with his father. Mr. O'Callaghan gives far too much credit to Lofas and little to Dr. Hagovsky.

The Court's order of December 13, 2000 demonstrates that the Court was desirous to conclude the matter as expeditiously as possible because it again, at paragraph 6 of that order, directed: "all parties are to cooperate with the Guardian ad Litem and the court appointed psychologist as they request in order that their reports may be expeditiously completed." Under no reasonable view could this Court be seen to have abdicated its responsibilities to have this matter move forward as it had directed, nor that it has

abandoned the child, the plaintiff's protests to the contrary, notwithstanding.

The defendant filed a motion returnable January 5, 2001 in which the defendant sought sanctions against the plaintiff including the dismissal of the complaint and the payment of all of defendant's legal fees and costs incurred in the entire case, unless the plaintiff immediately contacts Dr. Hagovsky and meets with him as well as plaintiff's wife, at Dr. Hagovsky's office. It is clear as recently as the oral argument of February 2, 2001, that the plaintiff has no intention to cooperate nor to meet with Dr. Hagovsky, nor with Ms. Scucci. All plaintiff has done is frustrated the Court's efforts to have fact-finding proceed. All he has caused the Court to do is to return and reconsider several times, issues that he sought also to appeal contemporaneously to the Superior Court Appellate Division, and then the New Jersey Supreme Court. To repeatedly bring matters before this Court while appealing them to other courts suggests the obsession of the plaintiff with legal challenges and with having things proceed in a fashion which he wants. This conduct is evidenced by the testimony of the defendant in her certifications of how when she and the defendant have a difference of view on parenting, he will disengage and proceed to take matters into his own hands, such as on the visitation exchanges. Defendant tells the Court how plaintiff abruptly terminates conversations and leaves with the child, only

to have the defendant left worrying as to the time of return of the child from the visitation. To use the common expression "it appears to be his way or the highway" in such matters. This attitude, this failure to cooperate, all clearly demonstrate to this Court that the plaintiff cannot cooperate and will not follow the Court's orders such that the Court must impose sanctions upon the plaintiff. Accordingly, the complaint of the plaintiff for custody and/or visitation is dismissed for his failure to follow the orders of the court and for his repeated efforts to frustrate and delay the fact-finding process as enumerated above. This situation has spiraled out of control and must be immediately rectified. Accordingly, the dismissal of the complaint with sanctions will place the responsibility squarely where it belongs which is upon the plaintiff. Further, if the plaintiff seeks to have the Court modify the visitation schedule which it hereinafter imposes, then he will have to demonstrate sufficient cause to the Court to change the visitation to the visitation plan he seeks.

* * * *

The defendant's application for counsel fees in the amount of $632.45 is granted. The Court is satisfied that it was because of the numerous applications submitted by the plaintiff to address issues already determined by the Court, that defendant was caused to incur legal fees and costs unreasonably and unnecessarily. The defendant had to file the motion for

sanctions. The defendant has applied for the sanctions relief in good faith as a result of the repeated number of applications brought by the plaintiff as hereinabove discussed. The defendant had to incur unnecessary legal fees and costs. The defendant has demonstrated her financial need and has incurred these counsel fees and costs outside of any legal services program offered by her employer. The plaintiff who is a New York attorney, has the financial ability as previously demonstrated to this court, to pay the counsel fees and costs. Accordingly, the award of fees and costs is made pursuant to R. 5:3-7(a) as a sanction for plaintiff's willful failure to comply with custody/parenting time orders.

It would not be appropriate for this Court, even though it has dismissed the plaintiff's complaint for the reasons hereinabove stated, to withhold comment on the various applications that Mr. O'Callaghan has made that have charged an actual or apparent conflict of interest between Ms. Scucci, the court appointed Guardian ad Litem and Mr. Salvaggio, defendant's counsel. Ms. Scucci has, in her certification and in her statements to this court, satisfied the Court that there is no connection in any way between her office through Michelle Hart, Esq. to the office of David Salvaggi, Esq. Ms. Hart has her own separated arrangement for sharing office space with Ms. Scucci. Ms. Hart has not been made privy to the contents of any files that are

personal to the Guardian ad Litem, and that are not law office files of Ann Scucci, Esq. Ms. Scucci has certified and has stated in open court that her appointment as Guardian ad Litem is a personal and individual appointment and is not shared in any manner with office associates. Ms. Hart's role has been limited in the involvement of the law practice to certain clients of Ms. Scucci and her role has not involved the Guardian ad Litem files and this file in particular. Ms. Hart has not done any work on the same. Ms. Hart certifies to that. It is evident that Ms. Hart joined the office of Ms. Scucci in terms of having her name listed as "of counsel" after the appointment of Ms. Scucci as Guardian ad Litem in this case. It was some time in or about early October, 2000, when she made the association with Ms. Scucci that is challenged by plaintiff, Daniel O'Callaghan in this case. Ms. Hart's certification confirms this. Ms. Hart began her association with Mr. Salvaggio as of counsel in early August, 2000. This finding is based on her certification and Mr. Salvaggio's certification filed with the court. It is clear that her role has been limited as well with Mr. Salvaggio's office and at no time did Ms. Hart have any knowledge of the O'Callaghan-B matter, nor did she work on the file in his office. She and Mr. Salvaggio certify to that.

The fact that Ms. Hart does carry an "of counsel" association with both law offices does cause this Court concern in terms of the claimed appearance of any impropriety. While

the Court finds no conflict of interest, and no impropriety, it is satisfied under all the circumstances that were this matter to continue further, it would have relieved Ms. Scucci from her obligations in this case because of the claimed appearance of impropriety. The Court finds that Ms. Scucci has acted appropriately under the circum- stances, has discharged her responsibilities as it would have expected her to, and she has been frustrated in completing her report by Mr. O'Callaghan. In view of this Court's determination dismissing the complaint, it frees Ms. Scucci of any obligation to further respond in the position of Guardian ad Litem for D. The Court knows that she truly shares a concern for D as does this Court, but any actions she takes hereafter will strictly be those of a volunteer and will not be at the direction of this Court nor under the cloak of a Guardian ad Litem.

* * * *

. . . The defendant right now, is the more appropriate parent to have physical custody, and in fact, is the more appropriate parent to be the sole decision maker regarding D's welfare. Of the two parents, she appears to be the better grounded in terms of her emotional stability, parenting skills and better able to carry forward what is needed for D. Her choice of a boarding school for D under the circumstances, as she explained in her papers before this Court, appears well made,

> especially in view of the current living arrangements between plaintiff residing and working in New York and the defendant residing in Chester, New Jersey, but working in New York City. If D were to attend the boarding school in New York City, it would be easier for the plaintiff to access his son for visitation and daily contact would be facilitated. The defendant's older son already attends that school. Thus, there would be the ability, if D enrolled, for D to have access to his older half-brother. There would also be at least a greater opportunity for plaintiff to have closer contact with his son, which he states is frustrated by his inability to speak to his son through telephonic communication, as claimed in his certification. The frequent contact of the parties with New York and D's desire to attend the boarding school can be accommodated by D attending the school and regular parenting contacts with D by both parents. The quality of education provided by the boarding school and the opportunities for D's educational growth and development appear to be good at St. Thomas.
>
> [Citations omitted.]

On or about February 16, 2001, defendant filed a motion, returnable March 16, 2001, seeking an order fixing plaintiff's child support arrears and requiring plaintiff to bring his support account current; compelling plaintiff to turn over to defendant her 1995 Saturn automobile along with its certificate of title; and for an additional award of counsel

fees. Plaintiff filed a cross-motion, seeking a reduction in his child support obligation.

These motions were argued before Judge Harper on March 23, 2001. On March 26, 2001, the court entered an order, denying plaintiff's application to reduce his child support obligation, and ordering plaintiff to pay defendant's counsel the sum of $9,559.43 in additional counsel fees. All other applications were denied. The judge appended to that order a statement of his factual findings and conclusions of law stating, in relevant part:

> 2. While plaintiff has submitted a "profit and loss" statement of his law practice for the calendar year 2000, it is not prepared by an accountant or a similarly situated preparer. Rather, it seems to be an estimate from plaintiff himself. A copy of plaintiff's 2000 tax returns may have yielded a different decision, however, copies of plaintiff's returns have not been submitted to the Court (as plaintiff states they have not been filed). Therefore, the Court has determined that the current weekly child support obligation of ninety dollars ($90.00) will continue.
>
> 3. The Court accepts plaintiff's position that he is current with child support through March 23, 2001 based upon his certification. Therefore, no electronic transfer of funds for payment of child support is necessary. Payments will be made by plaintiff directly to defendant for child support pending further order.

4. Using defendant's exhibits of invoices as to the amount due of counsel fees and costs, the Court has consistently arrived at a figure of ten-thousand one-hundred ninety-one dollars eighty-eight cents ($10,191.88). That figure, minus plaintiff's payment of six-hundred thirty-two dollars forty-five cents as per this Court's February 6, 2001 order, is nine-thousand five-hundred fifty-nine dollars forty-three cents ($9,559.43). This amount is due defendant's counsel by plaintiff no later than sixty (60) days from the date of this Order. Please see page nine (9) of this Court's February 6, 2001 letter decision as to the circumstances surrounding the imposition of counsel fees. The Court incorporates herein said findings and conclusions as if same were set forth herein at length.

5. Regarding the 1995 Saturn automobile, the Court finds that defendant is seeking a replevin of the vehicle. This Court does not have the requisite jurisdiction to entertain such an action. Accordingly, the parties are referred to the Civil Division if they choose to pursue further action regarding the vehicle under R. 4:61-1.

On April 23, 2001, plaintiff filed a notice of appeal from the February 6, 2001 and March 26, 2001 orders entered in the Family Part. The appeal was docketed under A-4782-00T3.

On or about March 23, 2001, plaintiff sought an order to show cause directed to the assignment judge, seeking rescheduling of all matters heard by Judge Harper before a different judge. On April 27, 2001, Assignment Judge Stanton executed an order declining to entertain plaintiff's proposed order to show cause.

During the pendency of A-4782-00T3, plaintiff has filed five separate applications with this court. On May 21, 2001, we entered an order denying plaintiff's application to supplement the record, accelerate the appeal, for a stay and other relief. By order dated June 8, 2001, we denied plaintiff's application to rely upon previously-submitted appendices and other relief. On November 27, 2001, we entered three orders, denying plaintiff's applications for a date certain and for discovery; denying his motion to vacate authorization for the exchange of the child at certain locations and to accelerate the appeal; and denying his application to accept briefs and appendices in A-4782-00T3 and A-6659-00T3 for filing as submitted, that order noting that A-6659-00T3 was dismissed for failure to pay the requisite filing fee.

On appeal in A-4782-00T3, plaintiff presents the following arguments for our consideration:

> Point I
> Parentage Act and Track System Violations: Judicial and Other Misconduct.
>
> Point II
> Pre-Judgment, Bias, Maladministration:
> Judge Harper Never Entered Any Stay of the Designated

Appointees - They Just Didn't Perform - Plaintiff Didn't Stop Them.

Hagovsky Has No Excuse for Non-Compliance with the August 25 Order - - Report "Within 14 Days."

Salvaggio Canceled the Early-September Interviews, then, Did Not Arrange for the Defendant to Meet with Hagovsky to/until mid-December.

In the Interim (December 8), L o n g S e c r e t e d Conflicts/Improprieties Were Revealed.

Scucci Never Accepted the GAL Assignment, Never Performed, then, Fabricated an Excuse.

Point III
A Truck Will Run Over This Child Any Day Now.

Point IV
Kinsella Principles Apply.

On or about April 24, 2001, plaintiff filed a motion in the Family Part, returnable May 18, 2001, seeking an order awarding him custody of D; imposition of a fine, penalty or other sanction against defendant's attorney for interference with plaintiff's parenting time; vacating of the February 6, 2001 order and letter decision, and the March 26, 2001 order; directing effective parenting time for plaintiff; reducing his child support obligation; requiring defendant to list plaintiff as D's father on the child's birth certificate and provide plaintiff with D's medical and school records; and assessing counsel fees against defendant. Plaintiff's motion was adjourned by the court to May 25, 2001, for a ruling on the papers submitted.

On May 17, 2001, defendant filed a cross-motion, seeking an order amending the parenting-time schedule; confirming that plaintiff is the natural father to allow his name to be placed on D's birth certificate; and assessing counsel fees against plaintiff.

The motions were considered by the court and an order entered on June 28, 2001 that provided, in summary, as follows:

> 1. Having acknowledged paternity, the court finds plaintiff is the child's natural father and the parties shall cooperate to amend D's birth certificate.
>
> 2. Plaintiff's requests for custody, for imposition of a fine or sanction against defendant's attorney, for an order vacating the prior orders of the court are all denied based upon the prior findings made by the court.

3. Plaintiff's request to vacate the March 26, 2001 order is denied.

4. Defendant is to forward the child's subsequent school records to plaintiff within fourteen days.

5. Defendant is to acquire D's medical records and forward a copy thereof, at plaintiff's costs, to plaintiff within thirty days.

6. Plaintiff's request for compensatory parenting time is denied because the parenting time did not occur as scheduled because of the parties' lack of communication with each other. As such, the court directs that the parties attend joint counseling to improve their communication skills and to better appreciate the best interests of D. Plaintiff is to choose the counselor and notify defendant of the counselor's name and address so that the appropriate appointments can be arranged.

7. Plaintiff's parenting time schedule is modified, as follows:

a) Because plaintiff has chosen not to exercise any of the allotted parenting time with D in New Jersey, plaintiff's parenting time with D in New Jersey on alternate Saturdays is suspended; however, if he reconsiders, plaintiff may contact defendant and arrange for such parenting-time sessions to resume as can be accommodated based upon the child's schedule;

b) Plaintiff's parenting-time sessions with D shall be on alternate Sundays in Brooklyn;

c) During parenting-time sessions, defendant shall either take D to New York City by train or will bring him to plaintiff's house by car. If D is transported by train, they will arrive by 9:42 a.m. and plaintiff can pick-up D in the New Jersey Transit Waiting Room, and plaintiff shall bring D back to that location by not later than 7:15 p.m. to allow defendant and D to take the 7:40 p.m. train back home. When defendant takes D to plaintiff's home in Brooklyn, she will arrive there at 10:00 a.m. and will pick-up D from plaintiff's home at 7:00 p.m. Pick-up and drop-off shall be curbside;

d) The previously-established forty-eight hour prior notice requirement for communication between the parties on any changes in the established schedule shall continue;

e) Any make-up parenting time shall be accomplished on the succeeding Sunday that the parenting-time session was missed or canceled.

8. Plaintiff shall provide defendant with an emergency telephone number where he can be directly reached on parenting-time days, which number defendant shall use only if necessary.

9. Defendant's request for an increase in child support is granted. Effective June 28, 2001,

plaintiff's weekly child-support obligation shall be $105.00, payable directly to defendant.

10. All other requests for relief not addressed in this order are denied.

The judge attached a statement of findings of fact and conclusions of law to the June 28, 2001 order stating, in pertinent part:

1. Plaintiff's request for defendant's default on this motion is denied. Attached hereto are copies of letters of correspondence from defendant's counsel's . . . office to my law clerk dated May 9, 2001 and May 10, 2001, respectively. While plaintiff may have chosen May 18, 2001, as the return day of his original motion, May 18, 2001, could not be accommodated by the Court. In fact, the notices sent to the parties advising them of the date the motion would be heard are dated May 9, 2001. As such, defendant's counsel was not on notice of the date the motion would be heard on May 18, 2001, as neither party had received confirmation from the Court as to when the motion would be heard. Consequently, when defendant's counsel contacted this Court's chambers on May 9, 2001, he was advised that the return date of the motion for May 18, 2001, could not be accommodated, and a notice would issue in the mail for the return date of the motion. Therefore, defendant's cross-motions and certifications, filed May 17, 2001, were timely

filed in accordance with R. 1:6-3(a), eight (8) days before the motion was scheduled to be heard on May 25, 2001. The Court notes, however, that plaintiff's reply certification, although dated May 23, 2001, [was] not subsequently filed until June 1, 2001. Plaintiff's reply is therefore in violation of R. 1:6-3(a) inasmuch as it was filed eleven (11) days subsequent to the due date of May 21, 2001, four (4) days prior to the return date of the motion. As such, plaintiff's reply was not timely filed. In any event, this Court notes that all submissions of the parties have been considered when rendering this decision, regardless of the date of filing of the submission.

2. In order to expeditiously accomplish the placing of plaintiff's name on the minor child's birth certificate, this Court has found plaintiff to be the child's natural father.

3. It is clear to this Court that plaintiff has no intention of exercising the alternating Saturday visitation with the minor child in Chester, N.J., afforded to him by the February 6, 2001, Order and letter decision. As such, in order to alleviate inconveniences to the parties and the child, plaintiff's alternating Saturday visitation in Chester, N.J., is suspended pending further order of the Court. Of course, if the parties are able to come to some agreement as to visitation in Chester, NJ, then they are free to do so.

4. As the minor child is of the age when he is becoming involved in activities outside of school, there has come to be a conflict with a Saturday visitation schedule. Accordingly, visitation for plaintiff with the minor child shall be alternating Sundays, in Brooklyn, with the exchange at either Penn Station (if the defendant and the child take the train into New York City), or curbside at plaintiff's Brooklyn residence.

5. As time goes on, it seems as though the communication between the parties in this case worsens. Such conflict and inability to effectively communicate is clearly not in the best interest of the minor child. The parties are directed to attend joint counseling sessions in order to improve their communication skills with each other. Their son is quite young, and as such, the parties will be crossing paths countless times over the next decade as well as upon his adulthood. It is in the best interests of the child that the parties get along, or at least learn to communicate effectively. The present situation leads this Court to believe that without professional guidance, these parties will not learn to communicate effectively with each other for the child's benefit. Accordingly, the parties are directed to attend joint counseling sessions to improve their communication skills and to better appreciate the best interests of their son.

6. Thus far, defendant has paid all transportation costs for plaintiff's visitation

> with the minor child. Accordingly, this Court finds that it is only fair that plaintiff contribute to such costs in the form of an additional fifteen dollars ($15.00) which shall be added on to plaintiff's current weekly support obligation of ninety dollars ($90.00).

On July 5, 2001, the Supreme Court denied plaintiff's motions to expand the record and for leave to appeal.[2]

On August 2, 2001, plaintiff filed a notice of appeal from the trial court's order entered on June 28, 2001 "and all other Orders, Findings/Conclusions and the Letter Decision entered in this case including all entries made/dated February 6, 2001 and March 26, 2001." That notice of appeal was docketed as A-6659-00T3.

On August 27, 2001, we entered an order in A-6659-00T3, denying plaintiff's application to accelerate the appeal, to consolidate A-4782-00T3 and A-6659-00T3, and to waive costs on A-6659-00. On November 27, 2001, this court entered an order dismissing plaintiff's appeal docketed as A-6659-00T3 for failure to pay the requisite filing fee. On January 14, 2002, we entered an order, denying plaintiff's application to vacate the November 27, 2001 order of dismissal, noting that although plaintiff paid the $300 deposit for costs, he had not yet paid the $175 filing fee. We directed that if said amount was paid by January 31, 2002, the Clerk shall reinstate the appeal. Plaintiff's application to

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[2] Although the record on appeal is not clear, plaintiff apparently sought leave to appeal from the Supreme Court from one of the orders, referenced infra, entered by this court in A-4782-00T3, and this order of the Supreme Court relates thereto.

accelerate the appeal was also denied. Plaintiff submitted the required filing fee and his appeal was reinstated.

On appeal in A-6659-00T3, plaintiff advances essentially the same arguments set forth in his brief submitted in A-4782-00T3, with the addition of the following argument:

> POINT V
> All remedies Sought Upon Plaintiff Pro Se's Motion for Enforcement of Litigant's Rights Were Meritorious and Should Have Been Granted.

No brief has been filed by or on behalf of defendant in either appeal.

At argument, plaintiff informed this court that subsequent to the June 28, 2001 order, additional proceedings have been conducted in the Family Part pertaining to an application by defendant for permission to enroll D in the American Boychoir School located in Princeton, and that there was a pending appeal concerning an order entered in the Family Part on August 30, 2002 regarding various issues.

Upon contacting the Clerk's Office, we have determined that another appeal is presently pending in this court, docketed as A-289-02T3, from an order entered in the Family Part on August 30, 2002 by Judge David B. Rand. That order prohibited the enrollment of D in the American Boychoir School; directed that D be enrolled in the Chester school system for the 2002-2003 school year; provided for the parties to share joint legal custody of D; required D to receive immediate therapeutic counseling at the parties' shared cost;

and re-instated plaintiff's parenting time with D with the Chester library as the pick-up and drop-off point.

On September 10, 2002, an order was entered in this court, granting defendant's motion for leave to appeal from the August 30, 2002 order, and entering a stay of the August 30, 2002 order, pending appeal. That order stated it was this court's intent to permit defendant to enroll D in the American Boychoir School as a day student for the 2002-2003 school term.

After carefully reviewing the record in the light of the arguments advanced by plaintiff in A-4782-00T3 and A-6659-00T3, we affirm the orders entered in Family Part on February 6, 2001, March 26, 2001 and June 28, 2001, substantially for the reasons articulated by Judge Harper in his comprehensive written opinions accompanying each order. We add the following.

Plaintiff's contentions that the Family Part violated the New Jersey Parentage Act, N.J.S.A. 9:17-38 to -59 by failing to keep the proceedings confidential, violated R. 5:1-4, by failing to make a track assignment, and violated the principles of law articulated in Kinsella v. Kinsella, 150 N.J. 276 (1997), are without sufficient merit to warrant extensive discussion. R. 2:11-3(e)(1)(E).

There was never any dispute concerning plaintiff's parentage; both parties recognized and acknowledged that plaintiff is D's biological father. Accordingly, these were not proceedings to be conducted under the Parentage Act to determine the parent-child relationship. See R. 5:14-1 to -3. This is a non-dissolution proceeding primarily concerning the issues of custody and parenting-time. In connection therewith, for purposes of obtaining an amended birth

certificate to add plaintiff's name as D's father, a stipulated acknowledgment of that agreed-upon fact was contained in both the July 28, 2000 and June 28, 2001 orders.

We find no violation of the differentiated case management system set forth in R. 5:1-4. The Family Part immediately recognized this matter as a "high conflict" custody and parenting-time case. At the initial hearing held on July 28, 2000, the court, inter alia, ordered a best interest investigation, granted discovery, and scheduled an interview of D. After conducting the interview, and in the face of additional applications and competing allegations, the court properly appointed a psychologist and a guardian ad litem by an order entered on August 25, 2000. Both parties were ordered to meet with the appointed psychologist and to cooperate in any therapy to be provided to D.

Instead of cooperation, the court was besieged with applications by plaintiff, and no efforts were made by plaintiff to meet with either the appointed psychologist or guardian ad litem. Those repeated applications, and the failure to meet with the psychologist and guardian ad litem prevented the court from obtaining sufficient information to focus on the specific nature of the custodial and parenting-time arrangement between the parties concerning D. One of the issues of immediate concern was whether plaintiff should be afforded overnight parenting-time sessions with D. Plaintiff failed to take the initiative by immediately meeting with both Hagovsky and the guardian ad litem. Plaintiff was also given the opportunity by the October 27, 2000 order to retain his own expert to review the matter. If the orders had been complied with, the trial court would have received reports and would have been able to conduct an expeditious hearing to address the overnight parenting-time question and other pressing issues. That never occurred, ostensibly because

plaintiff directed his focus toward seeking the disqualification of Lofas, Scucci, Judge Harper, defendant's attorney, and Hagovsky. Judge Harper has adequately addressed all of those issues in the numerous applications and decisions discussed supra.

The issues presented in Kinsella, supra, 150 N.J. at 285, were whether the psychologist-patient privilege may be invoked to prevent discovery of psychotherapeutic treatment records in the context of a marital tort claim against the patient, an extreme cruelty claim for divorce by the patient, and a child custody dispute between the patient and his spouse. Here, the Lofas letter dated August 24, 2000, addressed to defendant's attorney, reported the results of a single therapy session with D on August 23, 2000, recommending that D not be forced to sleep overnight at plaintiff's home "until he feels more comfortable about staying overnight[,]" and noting that although "D and his father have a good relationship[,] I do not believe that relationship should be jeopardized by moving faster than the boy can mentally absorb." The psychotherapist-patient privilege discussed in Kinsella, N.J.R.E. 505, protects the confidentiality of communications between the "patient" and the "psychotherapist." 105 N.J. at 294-304. In Kinsella, the issue was whether therapy records of the father should be disclosed in discovery for consideration, inter alia, in the custody and parenting-time dispute on the issue of parental fitness. Id. at 291.

Here, we are dealing with the child's therapy records. The therapist merely expressed a cautious approach to continued overnight parenting time. There was no request for the discovery of any records of any prior therapy sessions conducted by Lofas in which either plaintiff or defendant participated, that would have to be subjected to the scrutiny

and procedures outlined by the Court if the piercing of the privilege is sought. Id. at 328. We certainly recognize the conflict issue properly raised by plaintiff based upon Lofas' prior involvement with all family members. Certainly, Lofas could not serve the dual role as a therapist of the child and a court-appointed evaluator. See R. 5:3-3(a) (prohibiting appointment of a mental health expert who is providing or has provided therapy to any member of that family). However, here, the court did not appoint Lofas to conduct an evaluation; the court appointed Dr. Hagovsky to fulfill that role.

Procedurally, the case was relatively simple. Because of the "high conflict" issues, the judge correctly appointed a guardian ad litem and a psychologist to both facilitate the parenting-time sessions and communication issues, and to assist the court in determining the appropriateness of overnight parenting-time sessions and in formulating a custodial and parenting-time plan that best suited the interests of the child.

In a contested custody and parenting-time case, "the primary and overarching consideration is the best interest of the child." Kinsella, supra, 150 N.J. at 317 (citing Fantony v. Fantony, 21 N.J. 525, 536 (1956)). N.J.S.A. 9:2-4c provides an expansive array of factors that must be considered when adjudicating a custodial arrangement. Terry v. Terry, 270 N.J. Super. 105, 119 (App. Div. 1994).

Prior to plaintiff filing his complaint in the Family Part on June 22, 2000, and subsequent to the parties separation and defendant's relocation from New York to New Jersey in 1996, the physical custody of D remained with defendant. Accordingly, in seeking modification of that status quo ante, plaintiff bore the burden of proof to demonstrate that, due to a substantial change in

circumstances, the best interests of the child would be served by a transfer in custody. See Chen v. Heller, 334 N.J. Super. 361, 380 (App. Div. 2000); Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993).

The case management efforts undertaken by Judge Harper were designed to provide the court with sufficient information to evaluate plaintiff's claim for custody, and to determine a custodial and parenting-time arrangement that met the best interest of D. Plaintiff's efforts frustrated that effort and resulted in the court's dismissal of plaintiff's claims.

Our concern relates to the language contained in the February 2, 2001 order, dismissing plaintiff's complaint for custody and parenting time as a sanction for plaintiff's litigious conduct and lack of cooperation with court orders. Because the trial court continued to deal with custody and parenting-time issues, we interpret this action as a dismissal of plaintiff's claim for custody, as opposed to a dismissal of the case itself.

The issue of the nature and scope of plaintiff's participation in D's life as a father, memorialized in a meaningful parenting plan, still remains the subject of the court's inquiry in its parens patriae capacity to determine and safeguard the best interests of D. In the past, plaintiff has had overnight parenting-time sessions with D. Indeed, it may very well be that overnight parenting-time sessions with his father are in D's best interests. In absence of agreement between the parties, it is the obligation of the court to make that determination. From our review of the notice of appeal and notice of cross-appeal filed in A-289-01T3 it is evident that, notwithstanding the "dismissal" of plaintiff's complaint, subsequent to the June 29, 2001 order, there have been

numerous applications to the Family Part concerning custodial and parenting-time issues involving D.

Accordingly, we affirm the orders of the Family Part that are the subject of these appeals, and remand the matter to the Family Part on the issue of whether overnight parenting-time sessions between D and his father are in D's best interest and, if so, the nature and frequency of same. We do not view the stay granted in the September 10, 2002 order entered in A-289-02T3 as preventing the Family Part from determining an appropriate parenting plan for D with his father. We leave the case management of that issue including, but not limited to, whether appointment of a guardian ad litem and/or mental health professional, are necessary to reach those determinations, to the discretion of the Family Part. We hasten to add, however, that the overnight parenting-time issue should be expeditiously managed and adjudicated through imposition of tight time frames. Although full cooperation by both parties obviously serves the interest of their own respective positions, evaluations necessary to determine this issue can be accomplished with or without parental cooperation.

Finally, we echo the observations made by our colleague Judge Kestin a decade ago in Tahan v. Duquette, 259 N.J. Super. 328, 336 (App. Div. 1992), which are applicable here and bear repeating:

> We urge the parties to understand that courts in any jurisdiction are poor places to resolve such fundamental relational problems as child custody. Rules of law and procedural strictures are no substitute for personal choice in so intensely personal an issue. Parents who have divorced are frequently unable to

> communicate constructively on issues of importance; so they look to the legal system to resolve their problems. But no stranger in a judicial robe, however able and well motivated he or she may be, is equipped to make a decision as valid as the parents working together might make.
>
> Both [parties] must come to understand that security, peace of mind and stability are every child's right. Their inability to deal constructively with each other deprives their child of his due, which is within their power to give. Professed love is no substitute where it results in turmoil and uncertainty for the child who is pulled in opposite directions by his parents. This child will receive what he desperately needs in this regard only if both parents are genuinely prepared to subordinate their individual needs to the best interests of the child and begin to communicate with each other solely for the benefit of the child. We urge the parties to make an effort to resolve this matter between themselves with professional assistance. Otherwise, there is a substantial risk that they will doom their child to a future of conflict, sadness and certain psychological harm.

Affirmed and remanded for further proceedings consistent with this opinion.